84-7

NO. 83-

In The Supreme Court of the United States

OCTOBER TERM 1983

WILLIAM D. LEEKE, COMMISSIONER, AND T. TRAVIS MEDLOCK, THE ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA,

Petitioners,

VS.

SARAH THOMAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 758-2697

ATTORNEYS FOR PETITIONERS

QUESTION PRESENTED FOR REVIEW

I. WHETHER A JURY INSTRUCTION ON THE AFFIRMATIVE DEFENSE OF SELF-DEFENSE REQUIRING A DEFENDANT TO SHOW ITS EXISTENCE BY A PREPONDERANCE OF THE EVIDENCE IN A MURDER TRIAL IN SOUTH CAROLINA VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION?

TABLE OF CONTENTS AND OF AUTHORITIES

AUTHORITIES

The Attorney General of South Carolina, on behalf of the named Petitioners and the State of South Carolina, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The order of the United States Court of Appeals for the Fourth Circuit denying the petition for rehearing and refusing suggestion for rehearing en banc, filed April 5, 1984, is unreported and is appended hereto as Appendix A at page 11.

The opinion of the United States Court of Appeals for the Fourth Circuit entered January 12, 1984, reversing the judgment of the United States District Court for the District of South Carolina and remanding the case with direction to issue the writ of habeas corpus, reported at 725 F.2d 246, is appended hereto as Appendix B at page 12.

The opinion of the United States District Court denying the petition for a writ of habeas corpus and reported at 547 F.Supp. 612 is appended hereto as Appendix C at page 27.

The order of the Supreme Court of South Carolina affirming Sarah Thomas's conviction of murder and finding no error of law present in the direct appeal filed January 28, 1981, is unreported and appended hereto as Appendix D at page 45.

JURISDICTION

This petition for certiorari is for review of the judgment of the United States Court of Appeals for the Fourth Circuit in a 28 U.S.C. § 2254 habeas corpus action entered on January 12, 1984. By order filed April 5, 1984, the petition for rehearing and suggestion for rehearing en banc were denied.

This Court has jurisdiction to review the opinion rendered below pursuant to the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment Five of the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment Fourteen Section One of the United States Constitution

All persons born or naturalized in the United States are subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Code of Laws of South Carolina § 16-3-10 "Murder" Defined

"Murder" is the killing of any person with malice aforethought, either express or implied.

STATEMENT OF THE CASE

This habeas corpus action, pursuant to the jurisdiction invoked under 28 U.S.C. § 2254, was filed against the officials of the State of South Carolina by Sarah Thomas, who was convicted after a jury trial of murder and is presently serving life imprisonment in a South Carolina prison. The issue presented in

the action concerns the jury instruction in her 1979 murder trial which placed the burden on her of showing by a preponderance of the evidence the affirmative defense of self-defense. After the instruction, defense counsel timely objected to the court's instruction as not complying with *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and requested an instruction that placed the burden on the state to prove that she did not act in self-defense. (Appendix E and Appendix F.) The trial court denied his motion. In the court's instructions, the trial judge instructed the jury that it could return a verdict of murder, manslaughter, or not guilty. He distinguished the crimes of murder and manslaughter and described their respective elements in accord with South Carolina law. In South Carolina, "murder" is defined by statute as "killing of any person with malice aforethought, either express or implied." S.C. CODE ANN. § 16-3-10 (1976). The judge **repeatedly** informed the jury that the state had the burden of proving beyond a reasonable doubt all the elements of the murder charge. He also instructed the jury that Thomas had the burden of proving by a preponderance of the evidence that she acted in self-defense.

The charge instructed the jury that initially the state must prove all the elements of murder beyond a reasonable doubt. After that was accomplished, and only after all elements were proved beyond a reasonable doubt, the jury could then consider the elements of self-defense. The defendant had the burden of proving the existence of each of the four elements of the defense of self-defense: (1) that she was without fault in bringing on the difficulty; (2) that she actually believed she was in imminent danger of losing her life or of sustaining serious bodily injury; (3) that the reasonable prudent man of ordinary firmness and courage would have entertained the same belief; and (4) that she had no other probable means of avoiding the danger of losing her own life or sustaining serious bodily injury than to act as she did in the particular instance. See: *State v. Hendrix*, 270 S.C. 653, 244 S.E.2d 503 (1978). The court instructed that even if the defendant failed to satisfy her burden

of proving the existence of self-defense, the jury must acquit her if a reasonable doubt as to the state's elements of murder were entertained by a jury.

In essence, the instructions required acquittal if the defendant established all the elements of self-defense; but, if as a result of any evidence for or against any defense relied on by the accused the jury had a reasonable doubt as to malice aforethought, the jury could not convict her of murder and the offense would be reduced to manslaughter. Throughout the charge, the judge cautioned the jury that any reasonable doubt as to the defendant's guilt of murder required a "not guilty" verdict as to that offense. The jury convicted the defendant of murder.

The defendant appealed to the South Carolina Supreme Court. In her appeal, she contended that the jury instruction on self-defense was error because "it tended to shift the burden of persuasion on the elements of unlawfulness and malice, two essential elements of the state's case, this being in violation of the Fifth and Fourteenth Amendments to the United States Constitution." The state contended in its brief that the substantive criminal law of South Carolina required the state to prove every element of murder beyond a reasonable doubt, which was accomplished in this case, and that the defense of self-defense was a true affirmative defense in South Carolina. The South Carolina Supreme Court summarily rejected defendant Thomas' assertion and affirmed the conviction finding no error of law present. (Appendix D.)

Thomas then filed the petition for habeas corpus relief in the federal district court asserting that the trial court erred in placing the burden on the petitioner to prove self-defense by a preponderance or greater weight of the evidence. Thomas contended that self-defense negates both "malice aforethought" and "unlawfulness." The United States District Court found that the state had the burden of proving the existence of "malice aforethought." The district court also found that "unlawfulness" is not an element of the crime of murder in South Carolina. It found that self-defense is **not** the inverse

of "malice." Although self-defense excuses the "wickedness" of malice, the court held that proof of self-defense is much more difficult than proof of absence of malice. In conclusion, it held that "proof of self-defense by a preponderance of the evidence does not shift the burden to the defendant to negate any of the state's essential elements for a murder offense" and in this case, the state was properly required to prove each element of murder beyond a reasonable doubt in compliance with *Mullaney v. Wilbur, supra,* and *Patterson v. New York,* 432 U.S. 197 (1977).

In the appeal to the United States Court of Appeals for the Fourth Circuit, Thomas raised the same issue concerning the jury instructions. The Fourth Circuit, in a divided decision, held that the charge regarding self-defense was constitutionally inadequate and reversed the decision of the district court and directed it to issue the writ unless Thomas is tried anew within a reasonable period of time. The court held that "the instructions regarding the burden of proof were so inherently contradictory and confusing as to rise to a level of a constitutional infirmity under the principles of *Winship, Mullaney*... . Here we concern ourselves with a faulty allocation of the burden of persuasion." Judge Hall, in dissent, found South Carolina's rule requiring a defendant to prove self-defense does not violate his constitutional rights and the jury was properly instructed in this case. Upon petition for rehearing and suggestion for rehearing en banc, the Court of Appeals denied the request by a vote of five to four.

REASONS FOR GRANTING THE WRIT

1. The Court Below Has Decided A Federal Question Of Substance In A Way Probably Not In Accord With The Applicable Decisions Of This Court.

The essence of the holding by the Court of Appeals is that South Carolina's long established rule that self-defense must be shown by the defendant by a preponderance or greater weight of the evidence violates the United States Constitution. As a

result, hundreds of convictions in South Carolina in which self-defense was instructed in accordance with South Carolina law may result in habeas corpus proceedings leading to the granting of the writ of habeas corpus and vacation of the convictions. This unprecedented ruling seriously misconstrues this Court's decisions in *Patterson v. New York*, 432 U.S. 197 (1977) and *Engle v. Isaac*, 456 U.S. 107 (1982), regarding the burden of proof of affirmative defenses and whether the defense of self-defense is an affirmative defense.

In *Patterson*, this Court declined to adopt as a constitutional imperative that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. 432 U.S. at 209-211. In that case, distinguishing it from *Mullaney v. Wilbur, supra*, this Court noted that "nothing was presumed or implied against Patterson." *Id.* at 216. The state had the burden to prove beyond a reasonable doubt all the elements of the murder offense — the death, the intent to kill and causation. Further, the affirmative defense of emotional disturbance "[did] not serve to negate any facts of the crime which the State is to prove in order to convict of murder. It [constituted] a separate issue on which the defendant [was] required to carry the burden of persuasion." *Id.* at 207.

In the earlier case of *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Supreme Court considered a Maine rule which required a defendant charged with murder to prove that he acted in the heat of passion on sudden provocation in order to reduce the charge to manslaughter. Under Maine law, murder was a killing committed with malice aforethought, express or implied, and the deliberation necessary for malice aforethought could be presumed from the act of intentionally killing. *Mullaney v. Wilbur, supra;* 421 U.S. at 686-87. A defendant could rebut the presumption by proving "heat of passion." Because heat of passion is the logical opposite of malice, the statutory scheme thus had the effect of presuming an element of the crime, which the defendant was then required to disprove under an affirmative defense. The Court invalidated

the statute on the ground that it shifted the burden of proof on an element of the crime to the accused. *Patterson* emphasized that the constitutional defect in *Mullaney* was the combination of a presumption, which satisfied the state's burden of proof, and the affirmative defense required to rebut those presumed facts. 432 U.S. at 215-216. Therefore, *Mullaney* was carefully limited to its facts.

Patterson establishes that a state is not bound to disprove beyond a reasonable doubt every "exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment." 432 U.S. at 207. The proper inquiry, under *Patterson* and *Mullaney*, is whether the defense at issue negates any facts of the crime which the state must prove in order to convict. *Id.* If the defense in question does not negate any element of the crime charged, the state may properly place the burden of proof as to the defense on the defendant.

In *Engle v. Isaac*, 456 U.S. 107 (1982), the Supreme Court observed that a claim that the state could not constitutionally place the burden of proving "self-defense" on defendants presented a "colorable constitutional claim." *Id.*, 456 U.S. at 122. The court noted that "Ohio punishes only actions that are voluntary and unlawful." *Id.* The opinion concluded that "a careful review of our prior decisions reveals this claim is without merit. Our opinions suggest that the prosecution's constitutional duty to negate affirmative defenses may depend, at least in part, on the manner in which the state defines the charged crime. [Cites omitted]." 456 U.S. at 120.

The elements of murder in South Carolina are defined as "the killing of any person with malice aforethought, either express or implied." S.C. CODE ANN. § 16-3-10 (1976). The "absence of self-defense" is **not** a specified element. The Court of Appeals misconstrued South Carolina substantive law by holding that "unlawfulness" was an element of the crime of murder. There is **no** South Carolina statute or case law to support the arbitrary imposition of this new element into the substantive law in South Carolina. The Petitioners' attempt to

accomplish this was rejected by the South Carolina Supreme Court in the direct appeal as acknowledged by the District Court. The Court of Appeals and Thomas's counsel have attempted to litigate these claims concerning the "element" of "unlawfulness" which is solely a matter of substantive state law. In habeas corpus, the federal courts do not sit to exercise direct review over substantive state court decisions. *Carter v. Jago*, 637 F.2d 449, 457 (6th Cir. 1980). The scope is limited to errors of constitutional dimension.

"Malice aforethought" is an essential element of murder. *State v. Harvey*, 220 S.C. 506, 68 S.E.2d 409 (1951). Malice is defined as "importing wickedness and excluding a just cause or excuse." *State v. Doig*, 31 S.C.L. (2 Rich.) 179, 182 (1845). Although self-defense clearly acts as an absolute defense to murder, proof of self-defense under South Carolina law is more difficult to establish than proof of absence of malice inasmuch as self-defense consists of the four specific conditions set out in the Statement. See: *State v. Hendrix, supra.* 270 S.C. at 657-58, 244 S.E.2d at 505-506. In order to establish the absence of malice, these four conditions of self-defense are not at all relevant, The Court of Appeals has apparently extended the definition of malice to include "motive" in its analysis. "Motive is not an essential element of the crime [murder] and need not be shown." *State v. Thrailkill*, 73 S.C. 314, 318, 53 S.E. 482, 484 (1906).

Evidence concerning self-defense may not be relevant until the State proves the statutory elements of murder. The defense is in the nature of a confession and avoidance, by which he essentially admits the existence of facts which tend to establish the elements of murder. Here, the jury was charged that the state was required to prove all the elements of the crime, including malice, beyond a reasonable doubt. After that was accomplished and only after all the elements were proved beyond a reasonable doubt, the jury could then consider self-defense. The burden was on the defendant to show the existence of self-defense, but even if self-defense was not proven, the jury must acquit of murder if malice had not been proven

by the state beyond a reasonable doubt. Clearly then, under South Carolina law and this instruction, the burden of proof of an essential element of murder never shifted to the defendant.

2. **The Federal Constitutional Question Is Of Importance In The Administration Of Criminal Justice.**

Under South Carolina law, it has been long established that self-defense is an affirmative defense to the crime of murder and the burden of proof properly rests upon the defendant to show its existence by a preponderance of the evidence. See: *State v. Bolton,* 266 S.C. 444, 223 S.E.2d 863 (1976), cited with approval in *State v. Atchison,* 268 S.C. 588, 235 S.E2d 294, 299 (1977); *State v. McDowell,* 272 S.C. 203, 249 S.E.2d 916 (1978); *State v. Crocker,* 272 S.C. 344, 251 S.E.2d 764 (1979); *State v. Linder,* 276 S.C. 304, 278 S.E.2d 335 (1981); *State v. Griffin,* 277 S.C. 193, 285 S.E.2d 631 (1981); *State v. Finley,* 277 S.C. 548, 290 S.E.2d 808 (1982). In other published federal district court decisions, the placing of this burden on the defendant had been approved. *Porter v. Leeke,* 457 F.Supp. 253 (D.S.C. 1978); *Johnson v. Leeke,* 484 F.Supp. 1345 (D.S.C. 1978). While the Fourth Circuit held the particular instructions in this case to be "inherently contradictory and confusing as to rise to a level of a constitutional infirmity," the instructions given in this case are significantly similar to the instructions given in the above noted South Carolina cases and most likely in every self-defense case in South Carolina. In light of the Fourth Circuit's opinion vacating the conviction, a flood of litigation in the state and federal courts is expected and inevitable.

In light of the reference of *Patterson* and *Engle* to this issue depending on how a particular state defines a particular crime, a conflict in the circuit court decisions is highly unlikely, but may be found to exist. See: *Carter v. Jago,* 637 F.2d 449 (6th Cir. 1980). The primary motivation that should require certiorari to be granted is the continuing importance and continuing existence of this issue in South Carolina murder

cases in which the minimum mandatory sentence is life imprisonment. The unnecessary potential relitigation of these cases would burden the entire state and federal court system, disrupt the proper functioning of law enforcement officials who would be required to re-investigate the cases, and re-open the slowly healing wounds of the witnesses and victims' families who would be forced to relive once again the tragedies of the past.

CONCLUSION

For all the reasons stated above, the decision of the Court of Appeals in the instant case raises a question of importance in the administration of criminal justice which should be reviewed by this Court. We believe that it is in the public interest that South Carolina be enabled to secure a prompt, authoritative determination of the correctness of its position.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General for
South Carolina

DONALD J. ZELENKA
Assistant Attorney General for
South Carolina

COUNSEL FOR PETITIONERS

Post Office Box 11549
Columbia, South Carolina 29211
(803) 758-2697

APPENDIX A

United States Court of Appeals for the Fourth Circuit

Filed April 5, 1984

No. 83-6255

Sarah Thomas,

Appellant,

versus

William D. Leeke, Commissioner; The Attorney General of the State of South Carolina,

Appellees.

ORDER

The appellees' petition for rehearing and suggestion for rehearing en banc has been submitted to the Court. Upon the request for a poll of the Court on the suggestion for rehearing en banc, Chief Judge Winter, Judge Phillips, Judge Murnaghan, Judge Sprouse and Judge Ervin voted against rehearing en banc; Judge Russell, Judge Widener, Judge Hall and Judge Chapman voted in favor of rehearing en banc.

IT IS ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are DENIED.

Entered at the direction of Judge Murnaghan for a panel consisting of Judge Hall, Judge Murnaghan and Senior Judge Haynsworth.

For the Court,

/s/ WILLIAM K. SLATE, II
Clerk

APPENDIX B

United States Court of Appeals for the Fourth Circuit

No. 83-6255

Sarah Thomas,

Appellant,

versus

William D. Leeke, Commissioner;
The Attorney General of the State of South Carolina,

Appellees.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Falcoln B. Hawkins, District Judge. (CA 81-1523-1)

Argued October 3, 1983.

Decided January 12, 1984.

Before HALL and MURNAGHAN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Vance L. Cowden, University of South Carolina School of Law for Appellant; Donald J. Zelenka, Assistant Attorney General (T. Travis Medlock, Attorney General on brief) for Appellees.

MURNAGHAN, Circuit Judge:

Sarah Thomas, who was convicted of murder and sentenced to life imprisonment in a prosecution in the courts of South Carolina, appeals from the order of the United States District Court for the District of South Carolina denying her a writ of *habeas corpus*. She asserts the constitutional invalidity of her conviction on the grounds that the jury was wrongly instructed regarding the burden of proving self-defense.

Because we think that, read in context, the charge to the jury regarding self-defense was constitutionally inadequate, we reverse the order of the district court and direct it to issue the writ unless Thomas is tried anew within such reasonable period as the district court may fix.

I.

Thomas was convicted of murder for shooting Carnell Hunter on October 13, 1979 in Columbia, South Carolina. Up to a certain point, the facts are not in dispute. Thomas purchased, through a middleman, a quantity of heroin from the victim Hunter. Believing that the heroin was not of good quality, Thomas sought to reacquire the money she paid for it. Hunter returned some, but not all of the money, and a heated discussion between the two ensued.

Determined to recover the rest of her money, Thomas went into Dell's Lounge in Columbia, where Hunter was drinking with some friends. She had with her a pistol which she had borrowed from Sammy White, to whom she had stated that she was borrowing the pistol for a purpose other than to shoot Hunter. She approached Hunter, and demanded that he return the money. At gunpoint, Hunter smiled and gave her four dollars. Thomas began to retreat, heading away from Hunter and toward the door.

At this point, the various accounts diverge. According to witnesses for the state, Thomas turned and said "I ought to kill you," and shot Hunter four times. According to Thomas, she heard Hunter threaten to kill her as she retreated to the

door. Thomas saw him reach toward a bulge at his side, which she believed to be a gun, and shot Hunter three times.[1] Thomas' version of the facts was corroborated by an eyewitness, Gloria White.

II.

The trial judge presented the jury with the possible verdicts of guilty of murder, guilty of manslaughter, and not guilty. After instructing the jury that the state had the burden of proving guilt beyond every reasonable doubt, the court defined murder, manslaugher, and malice. The court charged the jury:

> Murder is defined as the willful, felonious killing of a human being with malice aforethought, that malice being either expressed malice or implied malice.

The judge defined malice as follows:

> Malice, is a word suggesting wickedness, hatred, and a determination to do what one knows to be wrong without just cause or excuse or legal provocation.

The court also provided two, apparently interchangeable, definitions of manslaughter, the second of which was

> the unlawful or felonious killing of a human being without malice in sudden heat and passion upon a sufficient legal provocation.

The judge then set out the defense of seld-defense, and instructed the jury regarding the burden of proof with respect to self-defense.

> Self-defense. Mr. Foreman and members of the jury, the law of South Carolina recognizes the right of every person to defend herself from death or serious bodily harm; and to do this, she may use such force as is necessary, even to the point of taking a human life. In other

---

[1]We observe in passing the discrepancy in the two accounts regarding the number of shots fired. Neither the parties, nor the court below, explained or even acknowledged the conflict. Since the shots themselves are relevant only in that they were fired by Thomas and produced the death of Hunter, we need not dwell on a consideration immaterial to our disposition of the case.

words, *self-defense is a complete defense* and entitles one charge[d] with an unlawful homicide to an acquittal or a verdict of not guilty if the legal elements of the plea of self-defense are shown to your satisfaction by the evidence. The right of self-defense rests upon necessity, either actual or reasonably apparent. In order to establish the plea of self-defense, [in] any homicide case, *the accused must show* four things. First, that she was not in fault in bringing about the immediate difficulty or the necessity for her taking the human life. Obviously one cannot through her fault, bring on a difficulty, and then claim the defense of self-defense. Second, that at the time she fired the fatal shot, she believed in good faith that she was in imminent danger of losing her life or sustaining serious bodily harm. Imminent means immediate — not past or future, but present. Third, that such belief was reasonable and that a reasonably careful and prudent woman, a woman of ordinary firmness and courage situated in like circumstances would have reached a similar conclusion. Four, where both the deceased and the defendant are on common ground, that is, where both have a right to be, then the defendant must show that she had no other reasonably safe, adequate, or obvious means of escape or way of [avoiding] the danger of losing her life or sustaining serious bodily harm except to act as she did.

* * * *

Where the defendant sets up, as here, the plea of self-defense and undertakes to present a case of apparent danger which is honestly believed in as a defense, the jury should in justice to the accused consider all the surrounding circumstances and facts calculated to influence motive. *Burden of proof in self-defense, I charge you* that *while* in South Carolina [*the State*] *is bound to prove every material allegation or claim* of the indictment *beyond every reasonable doubt* in order

to obtain a conviction, *the accused,* if she seek[s] to excuse the killing by relying upon the plea of self-defense, *is required to establish such plea of self-defense by the preponderance or greater weight of the evidence,* and therefore held to a [sic] lesser degree of proof than the State. *I told you explicitly that the burden of proof on the State is beyond every reasonable doubt. On the plea of self-defense, the defendant must establish that plea of self-defense by the preponderance or greater weight of the evidence.* The preponderance or greater weight of the evidence simply means *the greater amount of the truth on that issue.* It may be demonstrated by thinking of an ordinary or merchant scales. When you consider the plea of self-defense, it starts initially with the scales level and even. In order for the defendant to meet the required burden of proof of self-defense by the greater weight or preponderance of the evidence, she must tip those scales ever so slightly in her favor on that issue in order to meet the required burden; and if she tips those scales ever so slightly in her favor on the issue of self-defense, she has met the required burden of proof. If however those scales remain even or if they tip ever so slightly in the State's favor, she has not met the required burden of proof. The accused is entitled to the benefit of every reasonable doubt arising upon the whole case after considering the testimony for and against any defense relied upon by the accused. It does not matter whether or not the preponderance of the evidence is in her favor if you entertain a reasonable doubt as to her guilt. For under those circumstances, it would be your sworn duty to acquit the defendant or to find the defendant "not guilty."

(Emphasis supplied)

At the conclusion of the charge, Thomas' trial attorney made a timely objection to the court's instruction on the burden of proof in self-defense. The jury, after it had begun its

deliberations, returned to the courtroom and again was instructed on the definitions of murder, manslaughter, and malice. After further deliberation, the jury returned a verdict of guilty of murder, but accompanied its verdict with a recommendation of leniency.

III.

In re Winship, 397 U.S. 358 (1970), stands for the proposition that the Due Process Clause requires a state to prove beyond a reasonable doubt "every fact necessary to constitute the crime" with which a defendant is charged. 397 U.S. at 364. In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Supreme Court applied the rule of *Winship* in reaching its determination that, where a State makes heat-of-passion on the part of the accused a factor relevant to guilt, or degree of guilt, the due process clause requires the prosecution to bear the burden of proof on the heat-of-passion issue.

The Court, with respect to degree of guilt, retreated from *Mullaney* in *Patterson v. New York*, 432 U.S. 197 (1977). The *Patterson* court upheld the constitutonality of a New York law which cast upon the defendant the burden of proving, by a preponderance of the evidence, the affirmative defense of extreme emotional disturbance. That defense could reduce murder to manslaughter, not, however, lead to complete acquittal. The *Patterson* Court, did not profess to overturn *Mullaney*, rather it sought to distinguish it. Notwithstanding Justice Powell's compelling claim that the *Patterson* majority did so "on the basis of distinctions in language that are formalistic rather than substantive", 432 U.S. at 221 (Powell, J. dissenting), *Mullaney* must be viewed as alive, if not well.

> In reaching its results, the *Patterson* Court declined to adopt as a constitutional imperative, operative country-wide, that a State must disprove beyond a reasonable doubt every fact constituting any and all

affirmative defenses related to the culpability of an accused.

432 U.S. at 210.[2] At the same time, the Court acknowledged the continued effectiveness of "previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Id.* What the Court failed to answer — or question — was how the Constitution requires us to deal with an affirmative defense which constitutes not merely confession and avoidance but rather a complete refutation of the existence of the crime in the

---

[2]The dissent apparently would view the language in *Patterson* dealing with the particular defense of extreme emotional disturbance as universally applicable to *every* defense, including that of self-defense. In our view, such an automatic extension of the holding in *Patterson* ignores the crucial fact that *Patterson* dealt explicitly with the defense of extreme emotional disturbance. Extreme emotional disturbance is a considerably expanded version of the common-law defense of heat of passion on sudden provocation, and its adoption by New York constituted a liberalization of the substance of the penal law from the viewpoint of the accused. *See Patterson*, 432 U.S. at 207; MODEL PENAL CODE, § 201.3(1)(b) comment 5 (Tentative Draft No. 9, 1959); Jeffries & Stephens, *Defenses, Presumptions and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1356 n.93 (1979). In first introducing the concept, New York was entitled to condition it as it pleased. Whatever condition might be imposed, the law, substantively, from the accused's point of view, must have been improved by the introduction of an entirely new defense. Hence making the defense one for which the burden of proof was allocated to the defendant, and one which mitigated but did not completely eradicate guilt, occasioned no hardship or loss of benefit enjoyed before the law changed.

The situation is markedly different, however, where self-defense is concerned. Rooted in the Anglo-American tradition is the belief that a killing in self-defense is not a crime. "It is almost an axiom of our law that a man who kills another in the necessary defense of himself from death or even serious bodily harm is excused, and must be acquitted when indicted." Beale, *Retreat From A Murderous Assault*, 16 H. L. Rev. 567 (1903). That has been the law at least since the early eighteenth century, and prior to that time defendants were convicted but then routinely pardoned. Beale, *supra*, at 567-71.

The crucial differences in the development of the justification of self-defense and the partially extenuating circumstances of extreme emotional disturbance render it critical for us to apply *Patterson* with care. While it is elementary and fundamental to our jurisprudence that killing or wounding in self-defense is simply no crime at all, the same cannot be said for a killing by one suffering from extreme emotional disturbance. An automatic application of *Patterson* to a case concerning self-defense may constitute precisely the type of relaxation of the prosecution's burden of proof that *In re Winship* held to be constitutionally impermissible.

first place. *Engle v. Isaac*, 456 U.S. 107 (1982) provided the court with the opportunity to answer the question with regard to self-defense. The *Engle* Court acknowledged that a colorable constitutional claim was presented by the argument that once a defendant raises the possibility of self-defense, "the State must disprove that defense as part of its task of establishing guilty *mens rea*, voluntariness, and unlawfulness." 456 U.S. at 122. The Court declined to answer the question, however, holding that consideration of the claim was barred by the principles articulated in *Wainwright v. Sykes*, 431 U.S. 72 (1977).

IV.

We need not reach the question of whether the due process clause prohibits in all instances the placing on the defendant of the burden of persuasion with regard to self-defense. It is enough, for the purposes of this case, to observe that the court's instructions regarding the burden of proof were both conflicting and confusing. "Because proof of self-defense constitutes an absolute defense in that it renders the homicide justifiable, any error in the trial court's instruction concerning self-defense was necessarily prejudicial." *Wynn v. Mahoney*, 600 F.2d 448 (4th Cir. 1979), *cert. denied*, 444 U.S. 950, 100 S.Ct. 423, 62 L. Ed. 2d 320 (1979).

The trial court attempted to charge the jury both that the burden of persuasion of self-defense was on the defendant, and that the prosecution had the burden of proving "every material allegation or claim of the indictment beyond every reasonable doubt in order to obtain conviction." In so doing, it charged the jury that the state had the burden of proving that Thomas was guilty of murder, which the court had defined in part as a "willful, felonious killing . . . with malice aforethought." In its charge regarding manslaughter, the court used the terms "felonious" and "unlawful" interchangeably. The court later used the words "unlawful" or "unlawfully" three times in explaining malice to the jury. At the same time, the court instructed the jury that the accused must prove four

elements of self-defense, and that "the accused, if she seek[s] to excuse the killing by relying upon the plea of self-defense, is required to establish such plea of self-defense by the preponderance or greater weight of the evidence. . . . If the scales remain even or if they tip ever so slightly in the State's favor, she has not met the required burden of proof."

The court therefore had in one breath instructed the jury that the accused had the burden of proving self-defense by a preponderance of the evidence, yet in the other that the prosecution had to prove beyond a reasonable doubt that the killing had been felonious (and therefore unlawful) and with malice. Confusion in the minds of the jury was inescapable with a charge that was unequivocally contradictory. This Court has equated unlawfulness with "the absence of self-defense." *Wynn v. Mahoney, supra,* at 451. And this Court has also stated that "[s]elf-defense is wholly inconsistent with malice." *Guthrie v. Warden, Maryland Penitentiary,* 683 F.2d 820, 824 n.5 (4th Cir. 1982).[3]

In the face of such conflicting instructions, the jury's compliance with one part of the instructions necessarily led to its disregard of another part. If the jury truly demanded that the prosecution prove "unlawfulness" and "malice" beyond a reasonable doubt it would be ignoring the judge's instruction to require the defendant to prove self-defense. If the jury demanded that the defendant prove self-defense by a preponderance of the evidence it would be ignoring the judge's instructions that the prosecution prove "unlawfulness" and "malice" beyond a reasonable doubt.[4]

---

[3]The Court in *Guthrie* continued: "Hence, the state must disprove self-defense [when the evidence raises the issue] to establish the element of malice beyond a reasonable doubt as required by *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)." 683 F.2d at 824 n.5.

[4]We are unwilling to accept a distinction, pressed by the state and the district court, between unlawfulness as an element of the crime and unlawfulness as a descriptive legal conclusion. Since to be a crime an act must be unlawful, we are unpersuaded that much weight should be given to the presence or absence of the word "unlawful" in the

statutory definition of the crime. We recognize that in its effort to distinguish *Frazier v. Weatherholtz*, 572 F.2d 994 (4th Cir. 1978), the *Wynn* court did observe that Virginia, unlike North Carolina, gave no indication that it regarded unlawfulness as an element of murder. However, we give more weight to the first distinction noted by the *Wynn* court, that "the Supreme Court of Virginia had held the rule shifted only the burden of production, not the burden of persuasion, to the defendant." *Wynn v. Mahoney*, *supra*, 451 n.4. In the instant case, the burden of production having undisputably been met by the testimony of the defendant and her corroborating witness, defendant is objecting solely to the shifting of the burden of persuasion.

For these reasons, *Baker v. Muncy*, 619 F.2d 327 (4th Cir. 1980), is not inconsistent with the result achieved here. The *Baker* court merely cited *Frazier v. Weatherholtz* with approval for the proposition that the state may in certain instances "cast upon the accused the burden of proving self-defense." 619 F.2d at 327. The court did not, however, discuss *Frazier v. Weatherholtz* in the context of the burden of persuasion.

Thomas v. Arn, 704 F.2d 865 (6th Cir. 1983), is similarly distinguishable since Ohio placed only the burden of going forward (burden of production) on the accused. 704 F.2d at 870, quoting the statute in effect at the time of the crime, Ohio Rev. Code § 2901.05(A).

See also n.3 *supra*, quoting *Guthrie*, *supra*, 683 F.2d at 824 n.5. The *Guthrie* court stated that the state must disprove self-defense "(where the evidence raises the issue)," which we read to mean that the burden of production, but not the burden of persuasion, may be placed on the accused. In the instant case, there is no dispute that defendant has carried her burden of production. Thomas testified that she shot Hunter after she had retreated and after she saw Hunter reach for what she believed to be a gun. Her version of the facts was corroborated by an eyewitness.

Finally, in this context, we find illuminating the Model Penal Code's discussion of the burden of persuasion regarding self-defense, which appears in Article III, entitled General Principles of Justification. MODEL PENAL CODE, § 3.01, comment 1 (Tentative Draft No. 8 1958):

> 1. Paragraph (1) provides that any claim of justification under the Article constitutes an affirmative defense. The procedural consequence of this declaration is stated in Section 1.13(2), Tentative Draft No. 4, p. 7. The prosecution has no evidential burden unless and until there is evidence supporting the defense. Given such evidence, however, the defense must be negatived beyond a reasonable doubt. It is possible, of course, to go further and impose a burden of persuasion on the defendant as to any of the defenses established by Sections 3.02-3.10. Some states now do so with respect to such justifications as self-defense and the issue should be faced as we proceed. We have previously said, however, that we do not favor such a shift in the persuasive burden in the absence of the most exceptional circumstances, involving as it does an inroad on the principle that guilt must be established beyond reasonable doubt. See Comments Section 1.13, Tentative Draft No. 4, p. 112. We do not think that circumstances so exceptional obtain with respect to any of the justifications recognized in Article 3.

The confusion is highlighted by the realization that the jury might have been left with a reasonable doubt, but no more than a reasonable doubt, as to whether Thomas had acted in self-defense. In that instance, neither side would have carried its burden of proof under the trial court's instructions. The presence of a reasonable doubt would necessitate a conclusion that the prosecution had not proved its case beyond reasonable doubt. The presence of no more than a reasonable doubt would necessitate a conclusion that the defendant had not carried her burden of proving self-defense by a preponderance of the evidence.

Nor do we need to merely speculate as to the jury's possible confusion in the case. The jury returned a verdict of guilty of murder, but, all on its own, added a request for leniency, an option which the trial court had not presented to the jury. As Thomas' trial counsel observed, the inconsistency "obviously indicates that there was a compromise of some sort within the jury."

The district court apparently resolved this conflict by concluding that where the proof of self-defense led to a reasonable doubt, but no more than a reasonable doubt, the jury could return a verdict of manslaughter. His opinion therefore states in part:

> In essence, the instructions required acquittal if the petitioner established all the elements of self-defense, but if during her proof of self-defense the jury had a reasonable doubt as to malice aforethought . . . the jury could not convict her of murder, and the offense would be reduced to manslaughter.

The solution, however, is wholly unacceptable. It amounts to requiring a defendant to disprove malice in order to reduce her crime from murder to manslaughter. Where, as in South Carolina, a state has made murder and manslaughter separate crimes,[5] the district court's solution directly contradicts the Supreme Court's holding in *Mullaney*. As noted above, despite the advent of *Patterson*, *Mullaney* cannot be viewed as having

been overruled, particularly in an instance such as this in which the district court's solution transgresses the central tenet of that case.

We hold, therefore, that the instructions regarding the burden of proof were so inherently contradictory and confusing as to rise to the level of a constitutional infirmity under the principles of *Winship*, *Mullaney*, *Guthrie*, and *Wynn* discussed above. *Weatherholtz* and *Baker*, properly viewed, compel no opposite conclusion because *Weatherholtz* dealt only with burden of production and *Baker* merely cited *Weatherholtz* with approval. Here we concern ourselves with a faulty allocation of the burden of persuasion. Accordingly, we reverse the judgment of the district court and remand the case with directions to issue the writ unless Thomas is retried within such reasonable period as the district court may prescribe.

REVERSED AND REMANDED.

'Murder is defined in S.C. Code § 16-3-10 (1976). Manslaughter is defined in S.C. Code § 16-3-50 (1976).

HALL, Circuit Judge, dissenting:

I cannot agree with the majority's conclusion that the trial court's jury instructions were constitutionally inadequate. Thomas' contention that the trial judge erred by placing upon her the burden of proving self-defense belies both Fourth Circuit and Supreme Court precedent. Nor do I agree that the jury was confused by the instructions. I therefore dissent.

The trial judge instructed the jury that it could return a verdict of murder, manslaughter, or not guilty. He distinguished the crimes of murder and manslaughter and described their respective elements in accord with South Carolina law. The judge repeatedly informed the jury that the State had the burden of proving beyond a reasonable doubt all of the elements of the murder charge. He also instructed the jury that Thomas had the burden of proving by a preponderance of the evidence that she acted in self-defense.

The gravamen of Thomas's complaint is that South Carolina law, which allocates to the defendant the burden of proving self-defense by a preponderance of the evidence, violates the principles of due process. In my mind, this argument is clearly meritless.

The Supreme Court has recognized that a state may require a defendant to prove an affirmative defense. In *Patterson v. New York*, 432 U.S. 197 (1977), the Supreme Court rejected a defendant's due process challenge to a New York statute requiring him to prove by a preponderance of the evidence the affirmative defense of acting under the influence of extreme emotional distress. In upholding the statute, the Court observed that at common law the burden of proving all "affirmative defenses — indeed, 'all . . . circumstances of justification, excuse or alleviation' — rested on the defendant." *Id.* at 203 (quoting 4 W. Blackstone, *Commentaries* 201). The Court concluded that "once the facts constituting a crime are established beyond a reasonable doubt . . . the State may refuse to sustain the affirmative defense . . . unless demonstrated by a preponderance of the evidence." *Id.* at 207.

This Court has applied *Patterson* in several cases involving laws which place the burden of proving self-defense upon the defendant. In *Frazier v. Weatherholtz*, 572 F.2d 994 (4th Cir. 1978), we determined that because the State of Virginia considered self-defense an affirmative defense, it was not unconstitutional to require the defendant to bear the burden of proof. Although the *Frazier* Court addressed a Virginia statute, its holding is equally applicable in South Carolina, because the decision is based on the Federal — not the Virginia — Constitution. The Court cited *Patterson* for the proposition that due process was satisfied "when the state proved beyond a reasonable doubt 'every fact necessary to constitute the crime with which [the defendant was] charged.'" *Id.* at 996 (quoting *Patterson*, 432 U.S. at 206).

A few months later, in the unpublished opinion of *Maxey v. Martin*, No. 76-8265 (4th Cir. June 5, 1978), this Court relied on *Patterson* and *Frazier* to uphold a South Carolina jury instruction which placed upon the State the full burden of proof for murder and placed upon the defendant the burden of establishing self-defense by a preponderance of the evidence. *Frazier* and *Patterson* were relied on again in *Baker v. Muncy*, 619 F.2d 327 (4th Cir. 1980), where this Court held that it was not unconstitutional for Virginia to "cast upon the accused the burden of proving self-defense."[1] *Id.* at 331. As in *Frazier* and *Maxey*, the *Baker* Court stressed that the State was not relieved of its obligation to prove all of the essential elements of murder.

---

[1]The Court's full statement reads: "[w]e agree that self-defense is an affirmative defense under Virginia law and the State may, under principles set forth in *Patterson v. New York*, cast upon the accused the burden of proving self-defense." 619 F.2d at 331 (citation omitted). I can find nothing in this language to support the majority's conclusion that the *Baker* court was referring to the burden of production rather than the burden of persuasion. Pursuant to *Patterson*, a New York court "may refuse to sustain the affirmative defense of insanity *unless demonstrated by a preponderance of the evidence*." 432 U.S. at 207 (emphasis added). Thus, the statement that "under the principles set forth in *Patterson*" a state may "cast upon the accused the burden of proving self-defense" can only be read to mean that the state may place upon the defendant the burden of persuasion.

Most recently, in *Cooper v. State of North Carolina*, 702 F.2d 481 (1983), a Fourth Circuit panel, which included one of the majority members in the instant case, upheld a jury instruction which placed upon the defendant the burden of proving insanity. On appeal, the defendant argued that by failing to instruct the jury to consider evidence about his mental illness with regard to each specific element of the alleged crime, the court effectively forced him to prove the absence of those elements. This Court held that because an instruction on the State's overall burden of proof was given along with the general instruction on mental illness the jury charge was not constitutionally infirm.

These cases clearly establish that South Carolina's rule requiring a defendant to prove self-defense does not violate the defendant's constitutional rights. In the instant case, the trial judge properly instructed the jury. The instructions distinguished the elements of the crime on which the State had the burden of proof from the elements of the affirmative defense on which Thomas had the burden of proof. In addition, the jury was repeatedly reminded that the State carried the burden of proof on each element of the crime. The due process clause does not require more.

Nor do I agree with the majority's conclusion that because the jury found Thomas guilty of murder, but added a request for leniency, it was confused by the jury instruction. In my mind, the recommendation for leniency could just as likely have been based upon the jury's belief that the victim deserved his fate, and that, consequently, some mercy should be accorded the defendant.

By returning a verdict of murder, the jury indicated that the State had sustained its burden of proof beyond a reasonable doubt. In so doing, the jury necessarily rejected Thomas's claim of self-defense. Second-guessing the jury's decision-making process is a dangerous game, as judicial action based on such guesswork intrudes upon the domain of the jury.

Accordingly, I would uphold the conviction.

APPENDIX C

United States District Court, D. South Carolina, Columbia Division.

September 14, 1982

William D. LEEKE, Commissioner, and the Attorney General of the State of South Carolina,

Respondents.

Civ. A. No. 81-1523-1.

Vance L. Cowden, University of South Carolina School of Law, Columbia, S.C., for petitioner.

Preston F. McDaniel, Assistant Attorney General, Columbia, S.C., for respondents.

ORDER

HAWKINS, District Judge.

The petitioner, Sarah Thomas, is a state prisoner seeking habeas corpus relief pursuant to 28 U.S.C. § 2254. This action is before the court on the report and recommendation of the United States Magistrate made in accordance with 28 U.S.C. § 636(b)(1)(B). This court is charged with making a *de novo* determination of any portion of the Magistrate's recommendation to which specific objection is made, and it may accept, reject or modify, in whole or in part, the recommendations made by the Magistrate or recommit the matter to the Magistrate with instructions.

In his report and recommendation to this court, the Magistrate concluded that the trial judge's charge did not

unconstitutionally shift the burden of proof to the petitioner on the issue of self-defense. Therefore, it was recommended that the petitioner's application for relief be denied. The petitioner filed exceptions to the Magistrate's report.

After reviewing the record, the applicable law, tne briefs of the parties, and the recommendation of the Magistrate, it is this court's opinion that petitioner's request for relief be denied. An elaboration of this court's reasoning is in order since the resolution of this issue may resolve some problems in future homicide cases.

The petitioner is presently serving a life sentence in the Women's Correctional Center of the South Carolina Department of Corrections. She was indicted for murder at the December 1979 term of the Richland County Court of General Sessions. She was convicted of murder for shooting Carnell Hunter on October 13, 1979, in Dell's Lounge in Columbia, South Carolina. The defendant timely objected to the judge's charge with regard to self-defense. The petitioner appealed to the South Carolina Supreme Court on the ground that the trial judge's charge to the jury unconstitutionally shifted the burden of persuasion to the defendant with regard to self-defense in violation of *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1969), and *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). The South Carolina Supreme Court summarily rejected the petitioner's claim and affirmed the conviction.

The petitioner filed a habeas corpus application in this court alleging a violation of her fourteenth amendment due process rights. As in her appeal to the State Supreme Court, the petitioner's sole contention for relief is that the trial court erred in placing the burden on petitioner to prove self-defense by a preponderance or greater weight of the evidence.

The trial testimony revealed that the facts are not in dispute until moments before Thomas shot and killed Hunter. The petitioner purchased a quantity of heroin, through a middle man, from Hunter. After determining the heroin was not of

good quality, Thomas sought to reacquire the money she paid for it. Hunter eventually returned some, but not all, of the money, and a heated discussion between the two followed. Determined to recover the remaining amount of money, the petitioner borrowed a pistol from Sammy White and went into Dell's Lounge where Hunter was drinking with friends. Once in the lounge, she approached Hunter and demanded that he give back her money. At gunpoint, Hunter smiled and gave her four dollars. She began to retreat, heading away from him and toward the door.

At this point, the evidence becomes controverted. The testimony presented by a series of eyewitnesses called by the State indicated that after the petitioner began to leave, she turned and said, "I ought to kill you," and shot four times. The statement of the petitioner which was introduced into evidence indicated that she got the gun from Sammy White on the condition she shoot the deceased.

The petitioner's rendition of the events moments before the fatal shooting was quite different. The petitioner testified that while retreating she heard Hunter threaten to kill her and saw him reach toward a bulge at his side. She knew the bulge to be a gun, and shot three times. Her explanation of the shooting was corroborated by an eyewitness.

The petitioner contends that the trial judge's instructions charging the jury that the defendant had the burden to prove the defense of self-defense by a preponderance of the evidence unconstitutionally relieved the State of its responsibility to prove beyond a reasonable doubt all of the elements of the crime charged. Petitioner's argument is essentially that self-defense negates both "malice aforethought" and "unlawfulness," and that both of these elements are essential elements of the State's case requiring proof beyond a reasonable doubt. The State argues that it proved all the elements of murder beyond a reasonable doubt; and that self-defense does not simply negate one of the essential elements of the crime, but rather self-defense is a true affirmative defense requiring proof by the petitioner. Finally, the State argues that "unlawfulness"

is not an element it must prove for the offense of murder.

The South Carolina Supreme Court has continuously held that self-defense is an affirmative defense requiring the accused to prove by a preponderance of evidence all the necessary factors. *State v. McDowell*, 272 S.C. 203, 249 S.E.2d 916 (1968); *State v. Atchison*, 268 S.C. 588, 235 S.E.2d 294 (1977); *State v. Bolton*, 266 S.C. 444, 223 S.E.2d 863 (1976). In order for this court to overrule the State Supreme Court on this matter, we would have to determine that the procedural rule of self-defense violated the petitioner's constitutional rights.

[1] In South Carolina, the offense of murder is defined as "the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (1976). There is no issue in this case with regard to a "killing" or that a "person" was killed. The only issue is whether "malice aforethought" was present at the time of the killing. Malice may be presumed in South Carolina in the absence of circumstances of excuse or justification. *State v. Mason*, 54 S.C. 240, 32 S.E. 357 (1898). If the presumption was permissible, e.g., absence of circumstances of excuse, the presumption of malice would satisfy the State's burden to prove malice aforethought beyond a reasonable doubt. However, when all the circumstances of the case are fully developed, and the defendant produces evidence to show justification for the killing, any presumption as to malice will vanish. *State v. Rochester*, 72 S.C. 194, 51 S.E. 685 (1904). In essence, once the defendant produces evidence suggesting an absence of malice, the burden shifts back to the State to prove beyond a reasonable doubt the existence of malice. It is important to note that once an essential element of the State's case is presumed, the defendant need only to produce a slight amount of evidence negating the presumed element in order for the presumption to vanish, and the issue then becomes one of fact for the jury or fact-finder to determine. *Id.*

In the present case, "malice aforethought" could not be presumed since the petitioner came forward with evidence to

suggest the killing was justified due to self-defense. Therefore, the State had the burden to prove "malice aforethought" to the jury beyond every reasonable doubt. The petitioner's argument centers on the fact that since instructions charged that petitioner had the burden to prove self-defense, and since petitioner contends self-defense disproves malice and unlawfulness, the petitioner was required to disprove malice and unlawfulness.

In order to fully understand the constitutional requirements of standards of proof and who has the burden to prove certain elements in a case, a survey of United States Supreme Court cases dealing with this issue is necessary. In 1969, the Supreme Court held that the prosecutor must prove every element of the charged offense beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1969). This general principle appeared simple enough at the time of the opinion, but since then difficult issues as to what constituted elements of the crime and what was a true affirmative defense have perplexed courts everywhere.

In *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), the Supreme Court faced the task of determining whether Maine's rule requiring a defendant charged with murder to prove that he acted "in the heat of passion on sudden provocation" in order to reduce murder to manslaughter comported with the due process requirements set forth in *Winship*. In the State of Maine, malice aforethought was an essential element to the crime of murder, without which the homicide would be manslaughter. In the murder trial for defendant Wilbur, the jury was instructed that if the State established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a preponderance of the evidence that he acted in the heat of passion. The trial court emphasized that malice aforethought and heat of passion on sudden provocation are two inconsistent things; thus, by proving the latter the defendant would negate the former. The Supreme Court held that the Due Process Clause required the

State to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case. In order to clearly understand the Court's holding, it is important to note two aspects of the case: (1) the Court found that the heat of passion defense negated an essental element of the crime of murder — malice aforethought, and (2) even though the defendant produced evidence to rebut the malice presumption, i.e., the heat of passion defense, the presumption never vanished and the State was never required to prove the malice element.

The Supreme Court apparently limited the extent of *Mullaney* in its opinion in *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). In *Patterson*, the Court held a New York law requiring the defendant in a murder case to prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance was not in violation of the Due Process Clause. In distinguishing this case from *Mullaney*, the Court attempts to shed some light on what constitutes essential elements that the State must prove beyond a reasonable doubt.

Patterson was charged with second-degree murder. In New York, there are two elements to this defense: (1) intent to cause death; and (2) causing the death of a person. Malice aforethought is not an element of the crime. The State permits an accused to raise the affirmative defense that he acted under extreme emotional disturbance, but the accused has the burden to prove by a preponderance of evidence that such defense actually existed. If the jury determines that the accused intentionally killed but has satisfied his burden of proof as to the affirmative defense, then the jury had to find the defendant guilty of a lesser offense, manslaughter, instead of murder.

The Court began its analysis in *Patterson* by stating it is within a State's authority to regulate procedures under which its laws are carried out, including the burden of persuasion and burden of producing evidence, and such regulations are not subject to proscription under the Due Process Clause

unless they offend some fundamental principles of justice. *Id.* at 201-202, 97 S.Ct. at 2322. And recognition of certain defenses that an accused may attempt to raise

> does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate. We thus decline to adopt as a constitional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. . . . . [T]he fact that a majority of the States have now assumed the burden of disproving affirmative defenses — for whatever reasons — [does not] mean that those states that strike a different balance are in violation of the Constitution.

Id. at 209-211, 97 S.Ct. at 2326-2327.

The Court held that Patterson's conviction under the New York law did not deprive him of due process of law. The Court noted two important facts distinguishing this case from *Mullaney*. First, "nothing was presumed or implied against Patterson." *Id.* at 216, 97 S.Ct. at 2330. The State had the burden to prove beyond a reasonable doubt all the elements of the murder offense — the death, the intent to kill, and causation. Second, the affirmative defense of emotional disturbance "[did] not serve to negative any facts of the crime which the State is to prove in order to convict of murder. It [constituted] a separate issue on which the defendant [was] required to carry the burden of persuasion." *Id.* at 207, 97 S.Ct. at 2325.

In its most recent discussion of the burdens of proof in homicide cases, the United States Supreme Court, in *Engle v. Isaac*, ——— U.S. ———, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), was asked to determine whether an unconstitutional

shifting of burdens had taken place when a state required a defendant to prove his defense of "self-defense" in murder cases. Of course, that is the precise issue with which this court is presently confronted.

The *Engle* case actually involved three separate defendants who were convicted for murder after criminal trials in the State of Ohio. In all three trials, the trial judge instructed the jury that the accused bore the burden of proving "self-defense" by a preponderance of the evidence.

For over a century prior to 1974, the Ohio courts required criminal defendants to carry the burden of proving self-defense by a preponderance of the evidence. *Id.* at 1562. However, on January 1, 1974, a new criminal code for the State became effective, and the new code placed only the burden of production, not the burden of persuasion, on the defendant for all affirmative defenses.[1] For more than two years after its enactment, most Ohio courts assumed that the new code section did not interfere with the State's traditional burden-of-proof rules. Then, in 1976, the Ohio Supreme Court construed the statute to place the burden of disproving all affirmative defenses, such as self-defense, on the prosecutor.[2] All three convictions dealt with in the *Engle* case occurred after passage of the new criminal code, but before the Ohio Supreme Court decided that the burden-of-proof rules for affirmative defenses had been changed.

All three defendants petitioned for habeas corpus relief after exhausting their state remedies on the grounds that the jury instructions unconstitutionally shifted the burden of proving self-defense to them while state law clearly required the prosecutor to disprove such a defense.

The petitioners contended, *inter alia*, that self-defense negates certain elements of criminal behavior since self-defense

---

[1]Ohio Rev. Code Ann. § 2901.05(A) (1975).

[2]*State v. Robinson*, 47 Ohio St.2d 103, 351 N.E.2d 88 (1976).

[3]*Engle*, 102 S.Ct. at 1568, nn. 23 and 24, citing *Wynn v. Mahoney*, 600 F.2d 448 (4th Cir. 1979) and *Baker v. Muncy*, 619 F.2d 327 (4th Cir. 1980).

justifies an otherwise criminal act. Therefore, it was argued, once a defendant raises the possibility of self-defense, the state must disprove that defense as part of its task of establishing guilty *mens rea*, voluntariness, and unlawfulness. *Id.* at 1568.

Instead of facing this issue directly and attempting to clear up this murky area, the Supreme Court decided the outcome of all three cases on other grounds. The Court determined that by failing to object to the trial judge's charges at the end of the trial, the petitioners failed to preserve their claim before the state courts, and the principles articulated in *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), barred consideration of the claim in a federal habeas proceeding. Since the Court's holding is not relevant to the pending issues presented to this court, it is not necessary to discuss the actual holding. The Court, while addressing the argument of an unconstitutional shifting, did state that

> [t]his argument states a colorable constitutional claim. Several courts have applied our *Mullaney* and *Patterson* opinions to charge the prosecution with the constitutional duty of proving absence of self-defense. . . . While other courts have rejected this type of claim, the controversy suggests that respondents' argument states at least a plausible constitutional claim.

The Court cited numerous cases for both propositions, and the Fourth Circuit Court of Appeals was cited for accepting and rejecting the proposition that the burden is on the prosecutor to prove the absence of self-defense.[3]

In his concurring opinion, Justice Stevens rejected the majority's preoccupation with procedural hurdles and concluded that the Constitution does not require a prosecutor to shoulder the burden of disproving self-defense whenever willfulness is an element of the offense. Justice Stevens stated he would have reversed the judgment of the Court of Appeals, as the majority did, but his reversal was based on the merits of the petitioner's claims.

As can be expected, the Circuit Courts of Appeal have

struggled with the full meaning of the above line of cases. In particular, the Fourth Circuit Court of Appeals has made it unclear exactly how they read and interpret *Mullaney* and *Patterson*. In *Frazier v. Weatherholtz*, 572 F.2d 994 (4th Cir. 1978), the Circuit Court reversed the district court's determination to grant the habeas corpus relief. The district court held that the trial court's instructions to the jury with regard to self-defense ran afoul of the constitutional principle enunciated in *Mullaney*. The State of Virginia appealed to the Fourth Circuit.

The Court of Appeals initially held that the instruction challenged by Frazier passed constitutional muster because the instruction did not actually shift the burden of persuasion to the accused. However, they did not stop with that holding. The Court continued by reasoning that it was unnecessary to rest their decision on that basis since the *Patterson* case was dispositive of this case. Although the court did not elaborate in detail, a reading of the opinion suggests that since the State of Virginia considered self-defense an affirmative defense, it was not unconstitutional to require the defendant to bear some burden of proof.

Just when it appeared the Fourth Circuit had determined a state may constitutionally require a defendant to prove self-defense, their opinion in *Wynn v. Mahoney*, 600 F.2d 448 (4th Cir. 1979), apparently conveyed a contrary result. In *Wynn*, the defendant was charged with murder in North Carolina, and the trial judge instructed the jury that the defendant had the burden of proving self-defense to the satisfaction of the jury. The Fourth Circuit determined that the placing of the burden of proving self-defense on the defendant was unconstitutional under *Mullaney*.

The court in *Wynn* acknowledged that the State of North Carolina was required by its own rules to prove malice and unlawfulness beyond a reasonable doubt. Then the court reasoned that a killing committed in self-defense made the act lawful. Since the element of "unlawfulness" was an essential element of the offense of murder, it would be unconstitutional

to require the defendant to disprove or negate by a preponderance of the evidence any element of the offense that the prosecutor was required to prove beyond a reasonable doubt. *See In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1969). It would appear that the defendant's burden of proof as to any essential element of the offense charged would be merely to create a reasonable doubt as to the element's existence after the prosecutor has proven the element beyond a reasonable doubt.

At the conclusion of its opinion, the Court distinguished its earlier holding in the *Frazier* case. The Court noted that there was no indication that the State of Virginia regarded "unlawfulness" as an element of murder. *Wynn* at 451, n.4. Since self-defense was directed only at the lawfulness of the act, and the lawfulness of the act was not an essential element of murder to be proved by the State of Virginia, self-defense was a true affirmative defense under Virginia law.

This logic was affirmed by the Fourth Circuit in *Baker v. Muncy*, 619 F.2d 327 (4th Cir. 1980). In a first-degree murder case, the court accepted the Virginia Supreme Court rule that "absence of self-defense is not an element of murder under Virginia law." *Id.* at 331. Therefore, the court found "that self-defense is an affirmative defense under Virginia law and the State may, under principles set forth in *Patterson* (cite omitted), cast upon the accused the burden of proving self-defense." *Id.*

The court continued by saying it did not follow that petitioner's theory of the case, murder in self-defense, relieved the State of its obligation to prove all the essential elements of first-degree murder. Even in the absence of proof by the defendant that self-defense existed, the defendant could be acquitted if the State did not prove beyond a reasonable doubt all the elements of the crime charged.

The Fourth Circuit had occasion to review the *Mullaney* and *Patterson* cases one more time in *Guthrie v. Warden, Maryland Penitentiary*, 683 F.2d 820 (4th Cir. 1982). In that

case, petitioner Guthrie was convicted of first-degree murder in a Maryland criminal court. He filed for habeas corpus relief on the grounds that the jury was unconstitutionally instructed with respect to the burden of proof for self-defense. In a split decision, the panel of judges held that the trial judge's charge unconstitutionally shifted the burden of proving self-defense to the accused. Judge Hall dissented, concluding that the jury instructions did not lead the jury to conclude that Guthrie had the burden of proving self-defense. At 826.

In its majority opinion, the Court concluded that self-defense was wholly inconsistent with malice, which is an element of murder in Maryland.[4] Therefore, the Court apparently concluded that the state must disprove self-defense to establish the element of malice beyond a reasonable doubt. However, in the same breath, the Court cited *Baker v. Muncy, supra,* which allowed the State of Virginia to require the accused to shoulder the burden of proof of self-defense, and *Wynn v. Mahoney, supra,* which held the North Carolina rule of placing the burden on the defendant to prove self-defense was unconstitutional.

Significantly, the Court emphasized that Virginia law on self-defense differs from North Carolina law on self-defense. As stated earlier, Virginia does not require proof of the absence of self-defense in a murder offense, but North Carolina does since "unlawfulness" is an essential element of the offense of murder. In the *Guthrie* case, the Court noted that the Maryland Supreme Court has held it to be unconstitutional to require the defendant to prove self-defense. *See Evans v. State,* 28 Md. App. 640, 349 A.2d 300 (1975), *aff'd,* 278 Md. 197, 362 A.2d 629 (1976).

The only conclusion this court can reach from all the opinions rendered by the Fourth Circuit dealing with the burden of proof in self-defense cases is that procedural rules such as burdens of proof are to be determined by the individual states, unless a state rule requires a defendant to

[4]At 824, n. 5.

bear the burden of proof as to an essential element of the offense. Furthermore, this general conclusion seems consistent with the United States Supreme Court's holding in *Patterson v. New York, supra.*

A review of the United States Supreme Court and the Fourth Circuit Court of Appeals cases on the issue of burden of proof holds the state may not be relieved of proving beyond a reasonable doubt any of the elements of the crime charged. However, the defendant may be required to prove an element of fact not specifically requiring proof by the state. Such an element or fact would constitute an affirmative defense since it involves issues separate from the elements requiring proof by the state. The defense would not constitute a true affirmative defense if proof of the defense simply negates an element of the crime. This point was relevant in *Mullaney* where the court found the defense of "heat of passion" negated the element of malice. Since the defendant was required to prove the fact of "heat of passion," the state was unconstitutionally relieved of its burden to prove malice aforethought.

[2] Turning to the challenged instructions in the present case, this court will now determine whether the South Carolina rule requiring the defendant to prove self-defense violated due process as explained in the above-discussed cases.

The Supreme Court has recognized that states have the authority to regulate and balance the burdens of proof for any particular offense. Unless the state's rule offends some fundamental principles of justice in violation of a defendant's due process rights, the Supreme Court will not intervene and require different procedural rules. *Patterson,* 432 U.S. at 201, 97 S.Ct. at 2322.

As for the particular offense of murder, the trial judge properly charged the elements in South Carolina to be a willful killing of a person with malice aforethought. *See* S.C.Code Ann. § 16-3-10 (1976). One of petitioner's contentions is that "unlawfulness" is a necessary element of the crime requiring proof of its existence. This court cannot find any support for

petitioner's position. As in the State of Virginia, neither the "murder" statute nor the courts require proof as to the separate element of unlawfulness. The petitioner argues that it seems elementary that the State should prove "unlawfulness" before punishing her as a criminal. This court cannot argue with the proposition that the conduct must be determined unlawful before criminal punishment can be imposed, but such a determination is a legal conclusion following the jury's verdict. Since the jury returned a guilty verdict for murder, the court then deemed the conduct unlawful, and, therefore, punishable. Since South Carolina does not require proof of unlawfulness, petitioner's contention that self-defense negates the essential element of unlawfulness is without merit.

Malice aforethought, however, is an essential element of murder in South Carolina. *State v. Harvey*, 220 S.C. 506, 68 S.E.2d 409 (1951). Since all the circumstances of the case were developed at trial, and the defendant produced evidence suggesting absence of malice, malice could not be presumed. *State v. Rochester*, 72 S.C. 194, 51 S.E.2d 685 (1904). Therefore, the element of malice required proof by the State beyond a reasonable doubt.

Petitioner argues self-defense is really the inverse of malice, and requiring the petitioner to prove self-defense is really requiring proof of the absence of malice. This court does not believe that self-defense is the same element as absence of malice.

[3] Malice is defined as implying wickedness and excluding a just cause or excuse. *State v. Fuller*, 229 S.C. 439, 93 S.E.2d 463 (1956). Although self-defense clearly excuses the "wickedness" of malice, proof of self-defense is much more difficult to establish than proof of absence of malice. Self-defense requires establishing four conditions:

(1) That the accused was without fault in bringing on the difficulty;

(2) That the accused actually believed he was in imminent danger of losing his life or of sustaining serious bodily injury;

(3) That a reasonable, prudent person of ordinary firmness and courage would have entertained the same belief of imminent danger.

(4) That the accused had no other probable means of avoiding the danger of loss of life or sustaining serious bodily injury than to act as he did in the particular instances.

State v. Hendrix, 270 S.C. 653, 657-58, 244 S.E.2d 503, 505-506 (1978). In addition, some of the conditions have exceptions which this court need not consider at this time. In order to establish absence of malice, the four conditions of self-defense are not at all relevant. The defendant only needs to establish that she did not have wickedness in her heart at the time of the killing.[5]

Additionally, the reward accompanying proof of self-defense is different from the reward accompanying absence of malice. If a defendant can show the existence of self-defense, the jury will completely exculpate her. *Hendrix*, 270 S.C. 653, 244 S.E.2d 503. However, absence of malice, or failure of the state to prove malice beyond a reasonable doubt, only reduces a murder offense to voluntary manslaughter. *State v. King*, 158 S.C. 251, 155, S.E. 409 (1929); *See* S.C.Code Ann. § 16-3-50 (1976).

Although self-defense is wholly inconsistent with malice,[6] proof of self-defense does not merely negate malice. Self-defense and absence of malice are two different elements. It may be said that self-defense cannot co-exist in a murder case with malice, but absence of self-defense may co-exist with absence of malice.

For the above reasons, this court finds it is incorrect to determine that self-defense is the inverse of malice aforethought. Therefore, proof of self-defense by a preponderance

[5]Of course, in a murder trial defendant does not have to prove absence of malice since the state must prove malice beyond a reasonable doubt.

[6]*See Guthrie v. Warden*, 683 F.2d 820 (4th Cir. 1982), n. 5.

of the evidence does not shift the burden to the defendant to negate any of the State's essential elements for a murder offense.

A look at the charge objected to by the petitioner clearly shows that the State was required to prove all elements of the offense beyond every reasonable doubt. In relevant parts, the charge, was as follows:

> It is the solemn duty of the jury if not clearly convinced of her guilt beyond every reasonable doubt to the contrary to acquit the defendant, or to find the defendant "not guilty." The burden of proof is upon the State of South Carolina to establish by evidence to your satisfaction the guilt beyond every reasonable doubt of this defendant here on trial for the crime of murder.
>
> . . . .
>
> . . . Self-defense. Mr. Foreman and members of the jury, the law of South Carolina recognizes the right of every person to defend herself from death or serious bodily harm; and to do this, she may use such force as is necessary, even to the point of taking a human life. In other words, self-defense is a complete defense and entitles one charges [sic] with an unlawful homicide to an acquittal or a verdict of not guilty if the legal elements of the plea of self-defense are shown to your satisfaction by the evidence. The right of self-defense rests upon necessity, either actual or reasonably apparent.
>
> . . . Where the defendant sets up, as here,the plea of self-defense and undertakes to present a case of apparent danger which is honestly believed in as a defense, the jury should in justice to the accused consider all the surrounding circumstances and facts calculated to influence motive. Burden of proof in self-defense, I charge you that while *South Carolina is bound to prove every material allegation or claim of the indictment beyond every reasonable doubt in order to obtain a conviction,* the accused, if she seek [sic] to excuse the killing by relying upon the plea of self-

defense, is required to establish such plea of self-defense by the preponderance or greater weight of the evidence, and therefore held to a lesser degree of proof than in the State. I told you explicitly that the burden of proof on the State is beyond every reasonable doubt. On the plea of self-defense, the defendant must establish that plea of self-defense by a preponderance or greater weight of the evidence.

. . . .

. . . The accused is entitled to the benefit of every reasonable doubt arising upon the whole case after considering the testimony for and against any defense relied upon by the accused. *It does not matter whether or not the preponderance of the evidence is in her favor if you entertain a reasonable doubt as to her guilt. For under those circumstances, it would be your sworn duty to acquit the defendant or to find the defendant "not guilty."* (emphasis added). [Tr. p. 214-218.]

The charge instructed the jury that initially the State must prove all the elements of murder beyond a reasonable doubt. After that was accomplished, and only after all elements were proved beyond a reasonable doubt, the jury could then consider the defense of self-defense. The petitioner had the burden of proving the defense. But even if the petitioner failed to satisfy her burden of proving self-defense, the jury must acquit her if a reasonable doubt as to the State's elements were entertained by the jury. In essence, the instructions required acquittal if the petitioner established all the elements of self-defense, but if during her proof of self-defense the jury had a reasonable doubt as to the malice aforethought — the only element remaining for the State to prove — the jury could not convict her of murder and the offense would be reduced to manslaughter. Throughout the charge, the judge cautioned the jury that any reasonable doubt as to the petitioner's guilt of murder required a "not guilty" verdict as to that offense.

Since this court has concluded that South Carolina's rule requiring proof by a defendant as to self-defense is not in

violation of a defendant's constitutional rights when properly instructed by the trial judge, and since the trial judge in the present case did properly instruct that the State always had the burden to prove every element of the crime beyond a reasonable doubt, the petitioners's request for relief is denied.

AND IT IS SO ORDERED.

APPENDIX D

The State of South Carolina
In The Supreme Court

The State

Respondent,

vs.

Sarah Thomas,

Appellant.

Appeal From Richland County
Ralph K. Anderson, Judge

Memorandum Opinion No. 81-MO-16
Filed January 28, 1981

AFFIRMED

Assistant Appellate Defender David W. Carpenter, of S. C. Commission of Appellate Defense; and Assistant Public Defender Venable Vermont, Jr., both of Columbia, for appellant.

Attorney General Daniel R. McLeod, Assistant Attorney General Kay G. Crowe and Solicitor James C. Anders, all of Columbia, for respondent.

PER CURIAM: Appellant was convicted of murder and sentenced to life imprisonment.

After a careful consideration of the record and briefs, we are of the opinion that no error of law is present, and that a full written opinion would be without precedential value. Accordingly, the judgment of the lower court is affirmed under Rule 23 of the Rules of Practice of this Court.

s/ J. Woodrow Lewis
C.J.

s/ Bruce Littlejohn
A.J.

s/ J. B. Ness
A.J.

s/ George T. Gregory, Jr.
A.J.

s/ David W. Harwell
A.J.

APPENDIX E

CHARGE TO THE JURY BY THE HONORABLE RALPH KING ANDERSON.

* * *

It is the solemn duty of the jury if not clearly convinced of her guilt beyond every reasonable doubt to the contrary to acquit the defendant, or to find the defendant "not guilty." The burden of proof is upon the State of South Carolina to establish by evidence to your satisfaction the guilt beyond every reasonable doubt of this defendant here on trial for the crime of murder.

* * *

As I have indicated to you and as you are well aware of, the State has charged in this indictment the defendant with the crime of murder. It is necessary for me to instruct you as to the law of murder in South Carolina. Now, under a principle of law recognized in South Carolina that a greater crime includes the lesser, this indictment for murder includes not only the charge of murder, but also the charge of manslaughter. So, I will instruct you the law as to that crime, the crime of manslaughter.

Definition of murder: Murder is defined as the willful, felonious killing of a human being by a human being with malice aforethought, that malice being either expressed malice or implied malice. Definition of manslaughter: Manslaughter is defined as the felonious killing of a human being by a human being without malice in sudden heat and passion upon a sufficient provocation. As you see, the difference between murder and manslaughter is in the presence or absence of malice. Malice being present in murder, but not present in manslaughter. Definition of malice: Malice is a word suggesting wickedness, hatred, and a determination to do what one knows to be wrong without just cause or excuse or legal provocation. Malice need not be in the mind of the one doing the killing any particular length of time before the act of killing in order to render the killing murder. If it is present in the mind of the one killing any length of time before the act, then this presence would be sufficient to render the killing murder. Malice is said to be expressed malice where there is manifested a violent, deliberate intention unlawfully to take away the life of another human being. Malice is implied where one intentionally and deliberately does an unlawfully act which he or she then knows to be wrong and in violation of her duty to another, and where no excuse or legal provocation appears, and when the circumstances attending a killing show an abandoned heart, a malignant heart fatally bent upon mischief.

If the evidence should show under what circumstances a shot was fired or a blow delivered that took the life of another, then you, the jury, would have to determine whether under

such circumstances the act was malicious. While malice is presumed from the use of a deadly weapon, such as a pistol, where, as in this case, the circumstances relating to the homicide are brought out in the evidence, the presumption vanishes and the burden is upon the State of South Carolina to prove malice by evidence satisfying you, the jury, beyond a reasonable doubt.

Manslaughter is as I have already indicated, the unlawful or felonious killing of a human being by a human being without malice in sudden heat and passion upon a sufficient legal provocation. A legal provocation is some act which, either alone or in connection with words or circumstances, is calculated to throw one into a passion. Now, the sudden heat and passion upon sufficient legal provocation which mitigates or reduces down a felonious killing from murder to manslaughter, while it need not dethrone or eliminate reason entirely, it must be such as would naturally disturb or sway the reason of an ordinary person and render her mind incapable of cool reflection, and produce what, according to human experience, may be called an uncontrolled impulse to do violence. Words alone, however, approbious are not sufficient to constitute a legal provocation for homicide by the use of a deadly weapon. Words alone are generally not sufficient to reduce a charge of murder to one of manslaughter. However, words accompanied by hostile acts may according to the circumstances, not only reduce a killing from murder to manslaughter, but may establish the plea of self-defense.

Now, in connection with what I have instructed you about manslaughter, that is as to whether or not reasonable time for cooling has elapsed, you should take into consideration the whole circumstances surrounding the difficulty. You should consider the nature of the provocation, the defendant's physical and mental constitution, her condition in life and peculiar situation at the time of the affair, her education and habits, her conduct, manner and conversation throughout the transaction. In a word, all pertinent circumstances may be considered; and the time in which an ordinary man or woman

in like circumstances would have cooled, that is the reasonable time.

Self-defense. Mr. Foreman and members of the jury, the law of South Carolina recognizes the right of every person to defend herself from death or serious bodily harm; and to do this, she may use force as is necessary, even to the point of taking a human life. In other words, self-defense is a complete defense and entitles one charged with an unlawful homicide to an acquittal or a verdict of not guilty if the legal elements of the plea of self-defense are shown to your satisfaction by the evidence. The right of self-defense rests upon necessity, either actual or reasonably apparent. In order to establish the plea of self-defense, any homicide case, the accused must show four things. First, that she was not in fault in bringing about the immediate difficulty or the necessity for her taking the human life. Obviously, one cannot through her own fault, bring on a difficulty, and then claim the defense of self-defense. Second, that at the time she fired the fatal shot, she believed in good faith that she was in imminent danger of losing her life or sustaining serious bodily harm. Imminent means immediate — not past or future, but present. Third, that such belief was reasonable and that a reasonably, careful and prudent woman, a woman of ordinary firmness and courage, situated in like circumstances would have reached a similar conclusion. Four, where both the deceased and the defendant are on common ground, that is, where both have a right to be, then the defendant must show that she had no other reasonably safe, adequate, or obvious means of escape or way of affording the danger of losing her life or sustaining serious bodily harm except to act as she did. Now, if the person assaulted, being herself without fault, and by that is meant legal fault — reasonably apprehends death or serious bodily harm unless she kills her assailant, the killing is excusable and the accused is entitled to be acquitted or found not guilty. The party attacked is the judge of her own peril and can act safely upon the appearance, facts, and circumstances surrounding her at the time; and, the situation should be determined from the

standpoint of the defendant, it being for you, the jury, to say whether or not her apprehension of the immediate danger or of serious bodily harm was reasonable and would have been felt by a woman of ordinary reason and firmness. It is generally accepted that one who provokes or initiates an assault cannot escape criminal liability by invoking self-defense as a defense to a prosecution arising with respect to the injury or the death of her adversary; but, if after commencing an assault or initiating an encounter the aggressor withdraws in good faith from the conflict and announces in some way to her adversary her intention to retire, she is restored to her right of self-defense, so that if her adversary then pursues her, the aggressor may upon a reasonable belief that she is in danger — injure or kill her adversary. Such communication to the adversary of withdrawal by the aggressor may be explicit and verbal by the use of words or maybe implicit in conduct such as retiring or attempting to retire from the scene and abandoning the conflict.

Now, whether there was such a reasonable appearance of danger as would justify the killing is a question of fact for you, the jury, and in making your determination you should consider the conditions of both parties. If the appearance to the defendant at the time the fatal shots were fired was such that she could not reasonably and safely avoid the taking of the life of the deceased, and a woman of ordinary reason and courage would have arrived at such a conclusion, then it is not necessary for her to go any further, and she should be acquitted if she is free from fault in bringing on the immediate difficulty. One has a right to use force in repelling force or in protecting herself, and she cannot be required to make a nice calculation as to the degree or quantity or amount of force which may be necessary for her complete protection from the loss of her life, or serious bodily harm to herself.

Where the defendant sets up, as here, the plea of self-defense and undertakes to present a case of apparent danger which is honestly believed in as a defense, the jury should in justice to the accused consider all the surrounding circumstances and facts calculated to influence motive. Burden

of proof in self-defense, I charge you that while in South Carolina is bound to prove every material allegation or claim of the indictment beyond every reasonable doubt in order to obtain a conviction, the accused, if she seek to excuse the killing by relying upon the plea of self-defense, is required to establish such plea of self-defense by the preponderance or greater weight of the evidence, and therefore held to a lesser degree of proof than the State. I told you explicitly that the burden of proof on the State is beyond every reasonable doubt. On the plea of self-defense, the defendant must establish that plea of self-defense by the preponderance or greater weight of the evidence. The preponderance or greater of the evidence simply means the greater amount of the truth on that issue in order to meet the required burden; and if she ordinary of merchant scales. When you consider the plea of self-defense, it starts initially with the scales level and even. In order for the defendant to meet the required burden of proof of self-defense by the greater weight or preponderance of the evidence, she must tip those scales ever so slightly in her favor on that issue on order to meet the required burden; and if she tips those scales ever so slightly in her favor on the issue of self-defense, she has met the required burden of proof. If however those scales remain even or if they tip ever so slightly in the State's favor, she has not met the required burden of proof. The accused is entitled to the benefit of every reasonable doubt arising upon the whole case after considering the testimony for and against any defense relied upon by the accused. It does not matter whether or not the preponderance of the evidence is in her favor if you entertain a reasonable doubt as to her guilt. For under those circumstances, it would be your sworn duty to acquit the defendant or to find the defendant "not guilty." Now, if you should find the defendant "guilty" and there is a reasonable doubt as to whether she is "guilty" of murder or "guilty" of manslaughter, you must give her the benefit of that doubt and find her guilty of the lesser offense of manslaughter. But, of course, Mr. Foreman and members of the jury, you should not convict her either of manslaughter or murder unless her guilt has been established beyond every reasonable doubt.

* * *

MR. VERMONT: Yes, sir. An exception to your charge on the burden of proof being placed on the defendant for the preponderance of the evidence. I just do not feel that in light of the Malany U. S. Supreme Court that that is the law of the land. And, of course, the exception to the failure to give our charge on that which was No. 3 which was the corresponding charge. And, then we would also note an exception for the record to give what I feel to be the essential equivalent of or, in fact, our version of Numbers 7 and 8, and that is all I have.

THE COURT: Exceptions are noted are they are overruled.

APPENDIX F

State of South Carolina
County of Richland
State of South Carolina,
vs.
Sarah Thomas,
Defendant.

IN THE COURT OF GENERAL SESSIONS
Indictment
No. 79-GS-40-3360
DEFENDANT'S REQUEST NO. 3

To the indictment, the defendant has set up a plea of self-defense. Having done so, she is entitled to be acquitted by you unless the State has proven beyond a reasonable doubt that she did not act in self-defense. There is no burden on the defendant in this case to prove that she acted in self-defense in order to be found not guilty. Rather, the burden is on the State to prove that she did not so act in order to entitle the State to a verdict of guilty to the charge of murder.

It is not sufficient to convict that you suspect that the defendant did not act in self-defense, or that she probably did not do so. Rather, in order to convict the defendant of murder, you must find beyond a reasonable doubt that the defendant was not justified by self-defense. And if after considering all of the evidence in the case you are left with a reasonable doubt as to whether or not she acted in self-defense, you must resolve that doubt in the defendant's favor and find her not guilty of the charge of murder. *State v. Hankerson*, 288 N.C. 632, 220 S.E.2d 545 (1975), *rev'd. on other grounds sub. nom.* Hankerson v. North Carolina, ——— U.S. ——— 97 S.Ct. 2339 (June 17, 1977).

Respectfully submitted,

/s/ VENABLE VERMONT, JR.
Attorney for defendant.

Columbia, South Carolina
This _____ day of April, 1980.